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ABATEMENT.

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1. The plea authorized by the 25th section of the act concerning attachments, by which the defendant puts in issue the truth of the facts alleged in the plaintiff's affidavit, *is a plea in abatement.* If, after filing such plea, the defendant files a plea to the merits of the action it is a waiver of the plea in abatement.--Hatry vs. Shuman-- 547

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1. An administrator cannot sue his co-administrator at law.--Martin vs. Martin, adm'r of Martin 36
2. Evidence, 8.
3. Awards, 2.
4. Notice, 3.
5. Principal and Agent, 1.
6. An administrator, appointed under the laws of another State, cannot endorse a promissory note made payable to the intestate by a citizen of this State, so as to give the endorsee a right of action here in his own name.--McCarty vs. Hall 480
7. Partition, 1.
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1. Where the declaration of a prisoner is given in evidence, the jury may reject that part which is in his favor, and believe that which is against him--Green vs. The State--- 382

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1. Verdict, 1, 2.
2. The defendant filed a demurrer to complainant's bill, which was sustained by the court, and leave given to amend. At the succeeding term of the court, the complainant having failed to amend, the court dismissed the bill absolutely.

Held, That there being no bill of exceptions showing the terms upon which the leave to amend was given to complainant, the presumption is that the court properly dismissed the bill, but should have dismissed it without prejudice.--Timmons vs. Chouteau, Valle and Valle 223

ARBITRATION.

1. Arbitrators have power, under the statute, to award costs against either party, unless they be expressly prohibited from so doing, by the terms of the submission.--McClure vs. Shroyer 104
2. Awards, 1, 2.

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1. The owner of a judgment at law cannot assign to another person a part thereof, without the consent of the debtor.··Love vs. Fairfield····· ····· ···· ···· ···· ····· 309
2. Bonds and Notes, 10.
3. Evidence,
4. Administration, 6.

ATTACHMENTS.

1. This was a suit by attachment. The affidavit alleges the facts set forth in the third subdivision of the first section of the act, "That the defendant has absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law cannot be served upon him." The writ was in fact served upon the defendant. The defendant filed a plea, in the nature of a plea in abatement, putting in issue the facts set forth in the affidavit. Under this plea, the only issue to be tried by a jury is the fact whether the party so absconded or absented himself as to prevent the service of a writ: The *intention* to abscond is not a question for their inquiry.··Temple vs. Cochran····· ···· ···· ····· ···· ···· ····· ····· ····· 110
2. Judgment, 5.
3. Abatement, 1.
4. Under the statute of this State an attachment cannot issue in an action of *tort*—process of attachment is confined to actions upon contracts.··McDonald & Rew vs. Forsyth, et al···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ····· ···· ····· 549

AUTHENTICATION.

1. In order to authenticate, for the purpose of evidence, copies of proceedings had by a former justice of the peace whose term of office has expired, there must be some proof to show that the justice who certifies the copy, is successor to the one before whom the proceedings were had, and became possessed of his "docket and papers."··Halsted vs. Brice····· ····· ····· ····· ····· ···· ····· ···· ····· ····· 17
2. In order to authenticate a record of a court of a sister State, under the act of Congress of May 26, 1790, it is indispensable that the judge should state in his certificate that the attestation of the clerk is in due form.··Duvall vs. P. & S. Ellis····· ····· ·· ··· 20
3. Where a court of a sister State is not so constituted as to bring it within the act of Congress of 1790, providing for the mode of authenticating records, its proceedings may be authenticated in the common law mode···ib.
4. Wills, 5.

AWARDS.

1. Plaintiff and defendant, on the 25th day of September, 1847, entered into an article to submit certain matters of controversy between them to arbitrators. One of the terms of the article, was, that the award should be made and published within ten days from the date of October following. Held to be a sufficient publication of the award within the time··McClure vs. Shroyer····· ····· ····· ····· ····· ····· ·····
2. The arbitrators, before whom the plaintiff and defendant had submitted their matters of dispute, allowed plaintiff a demand which the defendant owed him as administrator. Upon the trial before the arbitrators, the defendant did not object to the nature of the claim, but only to the amount of it. Held not to be a sufficient cause to vacate the award···ib.

BANKRUPTCY.

1. A sheriff to whom a *capias* was issued, returned: "This execution is returned, not satisfied, there being no property of D found in B county, whereon to levy and make the same, and the said D having taken the benefit of the bankrupt law." The writ was delivered to the sheriff sixty days before D made his application for the benefit of the bankrupt law of 1842. Plaintiffs instituted suit upon the sheriff's bond for his failure to arrest D.

Held, That D was protected from arrest from and after the time of filing his application to the bankrupt court.

That the sheriff had until the day of the return of the writ to execute it; and it devolved upon the plaintiffs to prove special circumstances to show that the sheriff was guilty of negligence between the period of the issuance of the writ and the application of D to the bankrupt court.

That it was competent for the sheriff (to show his inability to execute the writ) to prove that D was not in his county from the date of the writ to the time of filing his

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application to the bankrupt court···The State to the use of McMahan & Huston vs. Rollins, et al···· ····· ····· ····· ····· ····· ····· ····· ····· ····· 179

BAR.

1. Where an indictment for a violation of the 4th section of the act to prevent illegal banking, describes the offence in the words of the act, a general conviction or acquittal, would constitute a bar to a subsequent indictment for a similar offence, during the period covered by the terms and intendment of the averments in the former indictment···The State vs. Presbury····· ····· ····· ····· ····· ····· ····· ····· 242
2. Plaintiffs were entitled, under the will of their father, who died in the State of Louisiana, to certain slaves after the death of their mother, who owned a life estate in them. Their mother, owning a life estate, instituted suit against defendant to recover the possession of the slaves and joined the names of the plaintiffs with her's in the suit. Judgment was rendered for the defendant. Their mother being dead, plaintiffs now sue in detinue to recover the slaves. Held that the judgment thus rendered against plaintiffs is no bar to their right to recover; that such judgment only concluded those who had a right to sue···Haile vs. Hill, et al····· ····· ···· 612

BILLS OF EXCHANGE.

1. If an agent makes a bill of exchange in his own name, or makes a contract in such shape as to bind himself on the face of the instrument, and not by his signature to bind his principal he is individually bound, although his agency was known by the other party at the time of making it··Smith vs. Spalding····· ····· ····· ····· ····· ····· ····· 529

BILL OF EXCEPTIONS.

1. Where all the evidence given is not preserved by bill of exceptions, the propriety of giving or refusing instructions by the circuit court cannot be reviewed in the supreme court.·· Hensley & Wright vs. Peck & Barnett····· ····· ····· ····· ····· ····· ····· 587
2. If no objection was made to any of the evidence given in the circuit court, and no exceptions taken to any of the instructions given by that court for either party, the supreme court will not notice either.··Steinman vs. Tolivar····· ····· ····· ····· ····· ·· 590

BOATS AND VESSELS.

1. Upon a proceeding under the act "concerning boats and vessels," no process can issue against a boat until a bond is filed··Steamboat Archer vs. William and Emanuel Goldstien···· ····· ···· ····· ····· ···· ···· ···· ···· ···· ···· ···· ···· ···· 24
2. Common carriers, 1, 2.
3. Mississippi River, 1.
4. Interpleader, 1.
5. Where the claim of a "part owner" against the boat, comes within the provisions of the first section of the act concerning "boats and vessels" it is a lien upon the boat as in cases of other persons. The only restriction upon the part owner is that he is requred to give notice in writing to all the other owners of his intention to commence his suit twenty days before the commencement of the action··Langstaff & Hulme vs. Rock···· ····· ·· 579

BONA FIDE PURCHASER.

1. The title of a *bona fide* purchaser of a slave from an administrator for a valuable consideration, and without notice of any fraud on the part of the administrator, is good··Pipkin adm'r of Keeton vs. Casey····· ····· ····· ····· ····· ···· ···· ···· ····· ···· 347

BONDS AND NOTES.

1. The defendants, as securities for A, signed a blank note, which was to be filled up by A, and to be made payable to the Bank of Missouri at Fayette, for the sum of $400 00. A, instead of making the note payable to the Bank, according to the understanding at the time it was signed, filled it up by making plaintiff the payee, and delivered it to him for a valuable consideration, he having full knowledge of the facts at the time he received it. Held, that this knowledge of the plaintiff, of the understanding of the defendants at the time they signed the blank, cannot affect his right to recover upon the note··Harris vs. Enyart····· ····· ····· ····· ····· ····· ····· ····· ····· ····· ····· 108
2. Sch··l Lands, 1.
3. Fraud, 1.
4. Notice, 1.

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5. What facts will excuse notice of a demand upon the maker or acceptor of a negotiable note, or amount to a waiver of such notice is a question of law for the determination of the court--S. and W. Wilson vs. Huston 146
6. The holder of a negotiable note, severally endorsed in blank by two or more persons, has no right to fill up one endorsement over the signatures, so as to make the assignment to him the joint act of all those whose names are thus written upon it--Morrison vs. Smith & Robbins 234
7. Interest, 2.
8. Plaintiff, who was a bona fide holder, for value, of a negotiable note, instituted suit against defendant, who was the first endorser. The defence was that defendant endorsed the note when blank, with the understanding that it was afterwards to be filled by the maker with a certain amount, and that the maker filled the note with a much larger amount than that agreed upon.
Held, that such conduct on the part of the maker, amounted only to a breach of confidence, and is no defence to the action--Tumulty vs. The Bank of Mo 276
9. If a person whose name is not inserted in the body of an instrument of writing, signs and seals it at the foot thereof, it is a sufficient execution to make it his bond in a court of equity--Keeton et al, vs. Spralding et al 321
10. A blank endorsement of a promisory note by the payee, though done solely for the purpose of collection, is *prima facie* evidence of an assignment for value, and may be so treated by any subseqeuent assignee--Odell & Frink vs. Presburry, Caskill and Franciscus 330
11. Administration, 6.
12. A bond is binding upon all the obligors who sign, seal and deliver it, although the names of part of the obligors be omitted in the body of the bond. The case of Adams et al. vs. Wilson, 10 Missouri Reports 341, overruled--Johnson & Cain vs. Steamboat Leigh 539

BURDEN OF PROOF.

1. Plaintiff sued defendant on a covenant of seizin of indefeasible estate in fee simple; the only breach assigned was that defendant was not seized of an indefeasible estate in fee simple; defendant pleaded that at the time of making the deed he was seized of an indefeasible estate in fee simple. Upon the trial neither party gave any testimony. Held, that the burden of proof devolved upon the defendant, but that the plaintiff could only recover nominal damage; that to entitle him to recover the purchase money with interest he must show that the defendant was not siezed of an indefeasible estate--Bircher vs. Watkins 521

CHANCERY.

1. Where a court of chancery obtain jurisdiction of a cause for any purpose, it may proceed with the whole case and decide it upon its merits--Keeton et al. vs. Spralding et al 321
2. Where an answer is responsive to the allegations in the bill, it must stand as proof of the facts stated in it, until contradicted by two witnesses, or by one witness and strong corroborating circumstances--Hewes vs. Music 395

CHANGE OF VENUE.

1. Informalities in the application for a change of venue are waived by a party appearing during the progress of the cause subsequent to its removal. The voluntary appearance of the party resisting the change, gives the court to which the cause is removed jurisdiction over his person--Powers vs. Browder, adm'r &c 154
2. Upon an application for a change of venue in a criminal case, reasonable notice must be given previously to the application; the reasonableness of the notice must be construed with reference to the existing parties--Golden vs. The State 417
3. The general law providing for a change of venue in criminal cases, does not apply to causes pending against persons undergoing sentence of imprisonment in the Penitentiary--ib.
4. Upon a change of venue, the clerk of the court to which the cause was removed omitted to endorse upon the transcript, the time when it was filed in his office; the defendant appeared and continued the cause; at the next term the court directed the clerk to endorse upon the transcript, the time when it was filed. Held not sufficient cause for arresting the judgment of the court--Day vs. The State 422

CHARTER OF ST. LOUIS.

1. The 17th section of the 7th article of the charter of St. Louis, approved February 15, 1841, was continued in force by the act of February 8, 1843--The city of St. Louis vs. Allen 400
2. The act of 1841, enlarging the corporate limits of the city of St. Louis, is constitutional--ib.

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COMMON CARRIERS.

1. In an action against a common carrier for a loss on freight occasioned by unnecessary delay and the unseaworthiness of the vessel; upon proof of such delay or unseaworthiness and a loss, the carrier can exempt himself from liability therefor, only by showing that such loss would and must have happened in the absence of such delay and unseaworthiness··Smith & Carter vs. Whitman use of Maguire····· ···· ···· ···· ···· ···· 352
2. In an action against a common carrier for a loss on freight occasioned by delay of the vessel, if it be proved that the article freighted bore the same price, at the place of delivery, at the time it was delivered that it did at the time it ought to have been delivered: yet the owner of the article freighted is entitled as damage, to legal interest on the amount of money which would have arisen from the sale of the article at the time it should have been delivered to the time it was actually delivered··ib.

CONSTITUTION.

1. School Lands, 1.
2. Jury fee, 2.

COSTS.

1. Arbitration, 1.
2. Trustee, 11.
3. In a criminal cause, where judgment is for costs only, without specifying the amount, an execution upon it which commands the sheriff (or other proper officer) to make the costs in the cause, is good; provided the name of each of the officers and other persons to whom fees are due, together with the amount due each be properly endorsed upon it··McKnight vs. Sprin···· ···· ····· ···· ····· ····· ···· ····· ···· ····· 534

CONTRACTS AND COVENANTS.

1. Plaintiff furnished defendant with five hundred dollars, with which, by agreement, he was to enter certain lands for plaintiff. Defendant used only part of the money in entering the lands, and appropriated the balance to his own use. Held, that the plaintiff may recover under the common counts in assumpsit, the amount not so applied, together with six per cent. interest thereon, from the time it ought to have been so applied··Henderson vs. Skinner···· ···· ···· ···· ···· ···· ···· ····· ····· ··· 99
2. Defendant covenanted with plaintiff to pay him eighteen dollars and fifty cents per acre for a tract of land within specified boundaries, supposed to contain two hundred and forty-two acres, more or less. Held, that defendant was not bound to pay the specified price per acre for two hundred and forty-two acres, but for the number of acres included in the specified boundaries··Ayres vs. Hays···· ···· ····· ····· ····· 252
3. A covenant to pay one hundred dollars in current bank notes or such as pass in Missouri, may be discharged by paying or tendering that amount in such bank notes as were passing in Missouri at the time of payment, without any discount in common transactions of buying and selling; and upon failure to pay the debt when due, the covenantor does not become liable to pay one hundred dollars in gold or silver, but only the specie value of that amount of current bank notes or such as pass in Missouri with the stipulated interest thereon··ib.
4. Although a party who does work under a special contract cannot recover the price under the common counts, while the contract remains unexecuted; yet he may recover under those counts the price of extra work not embraced in the special contract Powell vs. Buckley···· ··· ···· ···· ···· ···· ···· ····· ···· ···· ····· ···· ····· 317
5. Damages, 3.
6. Burden of proof, 1.
7. The convenant of seisin in a deed is an assurance to the purchaser that the grantor hath the very estate, both in quantity and quality, which he purports to convey. The covenant in such case is broken if the grantor does not own all the land covered by his deed··Pecare vs. Chouteau····· ····· ····· ···· ···· ···· ···· ····· 527
8. Bills of exchange, 1.
9. In a contract with A that in "consideration of the services rendered and to be rendered" by him, in certain suits mentioned, the defendants oblige themselves to pay him $500 absolutely, and upon a contingency mentioned, the further sum of one thousand dollars. Held, that the death of A before the future services were rendered, could not affect the right of his administrator to collect the sum of five hundred dollars, with interest from the date of the contract··Town of Carondelet vs. Allen's Ex'rs···· ····· ···· ···· ···· ···· ····· ···· ···· ···· ···· ···· ····· 556
10. Defendants purchased plaintiff's interest in a steamboat, and agreed with him

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amongst other things "to pay all the claims aginst said boat, and hold (plaintiff) harmless from all such claims." Held, that the claims alluded to are only the debts and liabilities due by the boat, by virtue of her contracts, and not mere rights of action against the officers or owners thereof for supposed neglect of duty as bailees.. Cathcart vs. Foulke & Sons..... 561

11. Waiver, 2.

CONSTABLE.

1. If a constable fails to return an execution within the time prescribed by law, he is liable: inability to execute it for "want of health," will not excuse him..Campbell vs. Luttrell..... 27

CONTRIBUTION.

1. The owner of a slave instituted a suit against the plaintiffs as part owner of a steamboat, and recovered damages against him for the loss of his slave while upon the boat employed as cook. Plaintiff now sues defendants as joint owners with him at the time of the loss for an amount of the judgment against him equal to their interest in the boat. Held, that to entitle him to recover, it devolves upon him to make out in this case a state of facts which would entitle the owner of the slave in the first instance to a judgment against the owners of the boat..Cathcart vs. Foulke & Sons. 561

CONTINUANCE.

1. A motion to postpone a trial in a criminal cause, is addressed to the sound discretion of the court. The supreme court will not interfere with the exercise of such discretion unless it appears to have been used unsoundly or oppressively..Green vs. The State..... 382

COUNTY COURTS.

1. County courts are expressly authorized to hold as many adjourned terms as they may deem necessary, and at any time, provided the period fixed for the adjourned session does not overrun the next regular term; and all business done at such adjourned sessions, is considered as done at one and the same term..Higgins, adm'r of Higgins vs. Ransdall..... 205

COURTS.

1. Circuit courts, and the "St. Louis court of common pleas," have power to affirm the judgment of justices of the peace on appeal..Hardison vs. Steamboat Cumberland Valley..... 226

CONVEYANCES.

1. A executed a deed, containing the words "grant, bargain and sell," to B, conveying to him a tract of land; B afterwards conveyed the land to C in trust; C sold the land as trustee, and D became the purchaser. After his purchase, D discovered that at the date of the deed from A to B, there was a mortgage upon the land which still remained unsatisfied. D instituted a suit at law in the named of B, or to his use against A, for breach of the covenants in the deed from A to B, and obtained judgment for the purchase money. A now files his bill and seeks to enjoin the judgment upon two grounds: first, that at the time A executed the deed to B, the incumbrance was known to both, and that there was then a verbal agreement that A might at some convenient time remove the incumbrance and should not be liable upon the covenant in the deed; and second that B had never authorized D to use his name in the suit at law.

Held, that by the purchase of D under the trust sale, he acquired all the rights imparted in the deed from A to B, including the use of his name in the suit at law; and that the understanding between A and B, would not be binding upon D, unless brought home to him at or before the period of his purchase..Alexander vs. Shreiber & Hertzhagen..... 272

2. Deed, 1.

3 By the act of 1825 regulating convevances, a quit claim deed is not sufficient to transfer to the grantee the legal title subsequently acquired by the grantor. But where the grantor makes a deed purporting to convey a fee simple absolute—that is an indefeasible estate, and at the time has no title whatever, either legal or equitable, a subsequently acquired legal title by the grantor will by operation of the act pass to the grantee..Bogy vs. Shoab & Collins..... 365

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CONVERSION.

1. Where a person sells personal property to another, and after receiving the pay for it, converts the property to his own use, he is liable, under the common counts in assumpsit, to the purchaser for the price paid and interest--Henderson vs. Skinner-- 99

DAMAGES.

1. In an action for a breach of covenant against incumbrances, the amount of damages depends upon what the convenantee has been compelled to pay to extinguish the incumbrance; and evidence as to the real consideration of the deed is not relevant to this issue--Henderson vs. Henderson's executors.... 151
2. Common carriers, 2.
3. Defendant covenanted with plaintiff to build for him a boat hull and deliver it on a stated day. He failed to deliver it until two months after the time specified: plaintiff then received it, and afterwards instituted this action upon the covenant for the failure to deliver the boat at the time agreed upon. The measure of damage, in such case, is the actual loss sustained by the plaintiff on account of the failure by defendant to comply with his contract. The loss of the probable profits of the boat during the two months constitutes no part of the damages--Taylor vs. McGuire.... 517
4 In an action of detinue to recover a slave, if the slave dies before judgment, the measure of damages is the use and hire of the slave up to the time of his death--Haile vs. Hill et al.... 612

DEED.

1. The delivery of a deed by the grantor, for the purpose of having it recorded, may under proper concurring circumstances, be regarded as a delivery to the grantee --Pearce, interpleader vs. Isaac & James Danforth.... 360
2. Conveyances, 3.
3. Statute of Frauds, 1.
4. Contracts and covenants, 7.
5. St. Louis Commons, 2.

DEPOSITIONS.

1. Whenever a deposition taken in a former suit is admissible as evidence in a subsequent suit between the same parties, a copy may be read upon proof of the loss of the original.—Finney vs. the St. Charles College.... 266

DETINUE.

1. In an action of detinue to recover a slave, if the slave dies before judgment, the measure of damages is the use and hire of the slave up to the time of his death.—Haile vs. Hill, et al.... 612

DYING DECLARATIONS.

1. Upon a trial for murder, the dying declarations of the deceased made with regard to the circumstances which produced his death, are to be received with the same degree of credit as his testimony would be if examined on oath as a witness.—Green vs. the State.... 382

EVIDENCE.

1. A and B were formerly partners in the mercantile business. After the dissolution of the partnership, A executed a note to C in the name of the firm. Upon the trial of a suit upon the note against B, the latter released A (who was not a party) from all claim on account of the note, and offered him as a witness to prove that the note was executed for his individual debt. Held, that A was a competent witness for B. —Long vs. Story, adm'r of Story, dec'd.... 4
2. Upon a petition or bill for divorce, brought by a husband against his wife, charging her with adultery, evidence of her *general good character* is admissible.—O'Bryan vs. O'Bryan.... 16
3. Where several persons are jointly indicted for murder, upon a separate trial of one, a witness may testify as to the unfriendly state of feelings at and before the time of committing the offence, between the deceased and those not upon trial for the purpose of proving malice and general conspiracy by all.—McMillen vs. the State.... 30

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4. The question whether an accomplice may be a witness for others joined in the same indictment with himself, provided he be not put upon his trial with the others, discussed.—ib.
5. Upon a trial for murder the declarations of the deceased are not admissible in evidence, unless they constitute a part of the *res gestae* or are made *in articulo mortis*. ib.
6. Presumption, 1.
7. If a witness is equally interested on both sides of a cause, he is competent; but if there is a clear excess of interest in favor of the party calling him, even for costs, he is incompetent.—Bridges vs Bell..... 69
8. A person interested in an estate as distributee, is a competent witness to prove facts, which increase the liabilities of the estate—such testimony being against his interest.—Richmond vs. Cross..... 75
9. If the parties to a suit have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one, is evidence against all.—Hurst & Salman vs. Robinson..... 82
10. A instituted a suit before a justice of the peace against B, upon an account which he had credited by an amount which he owed B: he obtained a judgment for the balance of his account. B took an appeal to the circuit court. In the meantime B instituted suit before another justice against A to recover the debt which the latter had credited upon his account. On the trial of this latter suit in the circuit court, (as well as in the justice's court,) A offered to prove by the record of the former suit and other evidence, by way of defence to the suit, that he had given B credit for the amount sued for in the former suit. This evidence the circuit court rejected on the ground that an appeal had been taken from the judgment of the justice, and was still pending and undetermined. Held: that the defence which A offered to make to the suit of B, was a good one; and that the evidence offered by him to prove the credit of B's account upon his own, should have been received.—Hudelmeyer vs. Hughes..... 87
11. Slander, 1.
12. In an action upon a covenant of seizin, as the damages are regulated by the real amount of the purchase money, parol evidence is admissible to prove a different amount from that mentioned in the deed. But in cases where the operation of a deed in respect to the *interest* or *estate* purporting to be conveyed is sought to be effected, parol testimony is not admissible.—Henderson vs. Henderson's executors..... 151
13. Depositions, 1.
14. Circuit courts have a discretion in the admission of evidence after a cause has been once closed, and the supreme court will not interfere with the exercise of it except when used oppressively.—Pearce, interpleader, vs. Isaac and James Danforth..... 360
15. Dying declarations, 1.
16. Admissions, 1.
17. The evidence of general bad character of a witness should not be confined to the single fact of want of veracity on oath.—Day vs. the State..... 422
18. Part payment, by defendant to plaintiff, of a note assigned to plaintiff, after the assignment, and a promise to pay him the balance, is sufficient evidence, *prima facie*, to prove the assignment.—Yankee vs. Crawford..... 475
19. Plaintiff instituted his action of ejectment for the northwest fractional quarter of sec. 35, township 49, range 17; he offered in evidence upon the trial a deed through which he claimed title, which describes the land conveyed as an "interest in the *southeast* fractional quarter of fractional section 35, township 49, range 17, including part of the town of Boonville, on the south side of the Missouri river, and in Cooper county," and in connexion with the deed he offered to prove that the northwest quarter of the section was *fractional*, and was the only fractional quarter in the section; and that *part of the town of Boonville* was situated upon it, and that no part of the town was situated on the southeast quarter; all of which evidence the court excluded. Held, that the evidence was properly excluded—that the description in the deed by metes and bounds as surveyed and numbered under the acts of Congress is the *particular* and *leading* description, and is sufficient to ascertain the premises, and the balance of the description should be rejected--Hart vs. Rector & Dobbins..... 498
20. Where the objection to evidence goes to the *sufficiency* of the proof, and not to its *competency* or *relevancy*, it is matter for the determination of the jury--Patterson vs. McClanahan..... 507
21. Where evidence has been given, upon which a jury might find a verdict, its sufficiency should be submitted for the determination of the jury, and if it be excluded by the court it is error--Winston vs. Wales..... 569
22. St. Louis Commons, 1, 2.
23. Witness, 3.
24. Practice, 13.

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ERASURE.

1. Where a person executes a note jointly with another, if the payee and other joint promisor alter the time of its maturity, without his knowledge or consent, it is void as to him. But if after such alteration is made, he assents to it, he adopts it as altered, and it is binding upon him··King vs. Hunt····· 27

FIXTURES.

1. Landlord and Tenant, 1.

FRAUD.

1. Where the payee of a note merely advises the principal to carry his property to a better market, out of the State, sell it, and return and pay his debts, and if unable to pay all, to pay *pro rata*, is not a fraud upon and will not operate as a release to, the securities in the note··Hawkins & Blackwell, adm'rs of Blackwell, vs. Ridenhour· 125
2. Parties and privies cannot allege their own fraud as a ground for varying or avoiding a deed··Henderson vs. Henderson's executors····· 151

GARNISHMENT.

1. If the maker of a note be notified of an assignment of it before he is summoned as a garnishee, the assignment constitutes a valid defence to the garnishment. If, however, this defence should prove unavailing under the garnishment, and judgment be rendered against him, it cannot affect the right of the assignee to recover the debt—Gates vs. Kirby,····· 157
2. A special deposit of coin does not constitute the depositary a debtor within the meaning of the sixth section of the act concerning executions, so as to subject him to a garnishment upon an execution against the depositor—Wood vs. Edgar,····· 451

HUSBAND AND WIFE.

1. If a woman who usually acts as the agent of her husband in his absence, borrows money and purchases property with it, which is afterwards used and claimed by him, the husband is liable for the debt, although he was never spoken to about it—Burk vs Howard,····· 241
2. If a woman who usually acts as the agent of her husband in his absence, borrows money under such circumstances as would make it the debt of her husband, and suffers the same to remain unpaid for more than six years, a promise by the wife in the absence of the husband, would take the debt out of the statute of limitations, and revive it against him··ib.

INDICTMENT.

1. An indictment for a violation of the 8th section of the act of this State entitled an "act to sustain the credit of the State," approved February 16, 1847, which follows the words of the act, is good—The State vs. Hereford,····· 3
2. An indictment which alleges that the defendant sold liquors "to persons to the grand jurors unknown," is supported by the testimony of a person who swears that the defendant sold liquor to him; unless it further appears from the evidence that the grand jury knew the witness to have been, in fact, the unknown person alluded to in the indictment—Hays vs. The State,····· 246
3. If an indictment fails to state the time when the offence was committed, it is bad—Irwin vs. The State, ····· 306
4. An indictment for a violation of the 4th sec. of the "act to prevent illegal banking, and the circulation of depreciated paper currency, &c.," which describes the offence in the words of the act is good—The State vs. Presbury,····· 342
5. Several persons may be jointly indicted for a violation of the "act to prevent illegal banking, and the circulation of depreciated paper currency, &c."··ib.
6. Bar, 1.

INFANTS.

1. If a judgment be rendered against an infant defendant who *appears by attorney*, he may at any time after he arrives at full age set the same aside, upon motion··Powell vs, Gott,····· 458

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INJUNCTION.

1. Where two justices of the county court grant a writ of injunction to stay proceedings upon an execution in the hands of a constable, although it may be the duty of the clerk of the circuit court to issue the writ, and not justices, yet if they do issue the writ, it (though informal) is sufficient authority to the constable to stop all further proceedings upon the execution--The State, use of Kirkland, vs. Ferguson et al. 166

INSTRUCTIONS.

1. An instruction which, in effect, tells the jury that they must find a verdict for either party, is erroneous, and it is good cause for reversing a judgment--Scoggins vs. Wilson et al., 80
2. Where the circuit court gives an instruction to the jury, embodying the principles of law, applicable to the facts of the case, the supreme court will not reverse the judgment because the circuit court refused an instruction which was the converse of the one given--Hurst & Salmon vs. Robinson, 82
3. If the instructions given by the court be not objected to, at the time they are given, and the giving them be not assigned in the motion for a new trial, the supreme court will not consider them--Gordon vs. Gordon 215
4. Where the instructions given by the court contain the law applicable to the facts of a case, the supreme court will not disturb the finding of the jury, if the evidence warrants it--Von Phul & McGill vs. Moffatt, 286
5 Where no instructions are given, or where those given are correct, the testimony must greatly preponderate against the finding of either the court or jury to warrant the interposition of the supreme court--Allen, to the use of Todd & Krum vs. Garesche, Adm'r of Anson 308
6. The action of the circuit court in giving or refusing instructions will not be reviewed by the supreme court, unless it be assigned in a motion for a new trial--Vivion vs. Lafayette county, 543
7. Where the instructions given by the circuit court properly put the questions presented by the evidence before the jury, the refusal of others is not sufficient ground for reversing the judgment--Huntsman vs. Rutherford et al., 465
8. Although instructions asked by a party and refused by the circuit court assert correct legal principles, according to the facts assumed by them, yet if the jury by their verdict have negatived the hypothesis upon which the instructions were based, the supreme court will not interfere with the judgment--Patterson vs. J. & J. McClanahan, 507
9. Non-suit, 3.
10, Instructions which contain mere abstract legal propositions, not arising necessarily from the facts of the case, ought not to be given--Greely & Gale vs. McNabb, 596
11. Where a correct instruction asked by a party has been refused, but afterwards given substantially in another form, the refusal to give it in the form asked is not good cause for reversing the judgment--Darby vs. Charless, 600
12. An instruction which is calculated to mislead the jury by withdrawing from their inquiry material facts, is improper, and it is good cause for reversing the judgment--Sigerson vs. Pomeroy & Andrews, 620

INSURANCE.

1. If the owner of property insured, upon being notified of its loss, abandons it and notifies the underwriters of the abandonment, from the time of the abandonment the underwriters become the owners of the property, whether they acccept the abandonment or not, provided the loss happens from one of the perils insured against--Gould vs. Citizens Insurance Co., 524

INTERPLEADER.

1. An interpleader cannot be entertained in a suit under the act "concerning boats and vessels--Garrison vs. McAllister & Co., 579

INTEREST.

1. All judgments, rendered since the act approved January 15, 1847, "regulating the interest on money," took effect, can bear only six per cent. interest, no matter what interest the instrument, on which the judgment is founded, bears--Hawkins & Blackwell, Adm'rs of Blackwell, vs. Ridenhour, 125

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2. A bond or note for the payment of a sum of money on a specified future day, "with eight per cent. interest," does not bear interest until the debt becomes due--Ayres vs. Hays 252
3. Where the plaintiff paid money, in another State, for the use of the defendant, the jury may give the plaintiff interest according to the law of this State, unless the defendant shows that the rate of interest in the State where the liability occurred is less--Hall vs. Woodson, Adm'r of Scott, ... 462

JUDGMENTS.

1. A judgment confessed before a justice of the peace on a day not his law day, is void --Hunter et al. vs. Reinhard, ... 23
2. The defendants were indicted jointly, for permitting gaming in a house occupied by them. The jury assessed a fine of fifty dollars against the two. A joint judgment was rendered against them for the amount of the verdict: Held, that if any error was committed by the court in entering a joint judgment against the defendants, it was in their favor, and they have no right to complain--Barada & Barada vs. The State 94
3. Interest, 1.
4. Assignments, 1.
5. Where a special judgment has been rendered against a debtor, without a personal service, under a proceeding in attachment, upon the death of the debtor after the rendition of the judgment, the lien of the attachment is lost. Nor can such judgment be made the basis of any proceeding in the county court; nor can an execution issue thereon--Harrison vs. Renfro, ... 446
6. Replevin, 1.
7. Plaintiffs sued the town of Carondelet in an action of debt; the process was served upon the chairman of the board of trustees; before the suit was called he ceased to be chairman, and another person succeeded him; a judgment by default was rendered; during the term the successor filed a motion to set aside the judgment by default; the motion was sustained by an affidavit, "that the late chairman of the board of trustees, who had neglected to attend to the suit, had ceased to be such chairman that the affiant was his sucessor, had attended to the suit as soon as he heard of it, and was advised by counsel, that the town had merits and a just defence to the action;" the court refused to set aside the judgment by default. Held, that the circuit court did right; that although the affidavit could be held sufficient on the score of merits, it disclosed a want of diligence on the part of the corporation--Town of Carondelet vs. Allen's Exr's, ... 556
8. The counsel for the defendants intending to be absent during the term to which this cause was returnable, engaged the services of another attorney to attend to his causes generally; he gave the attorney thus employed a memorandum of his cases; in this memorandum, the present case was marked "Webster vs. Harris & Williams." Upon examining the docket, the substitute attorney found no such case upon it. The cause was docketed by the clerk, "Webster vs. McMahan, &c.," when the cause was called, no counsel appeared; a judgment by default was rendered. A motion was made to set aside the judgment, which was overruled. The judgment of the court below overruling the motion affirmed--Webster vs. McMahan et al., ... 582
9. Bar, 2.

JURISDICTION.

1. Chancery, 1.
2. The St. Louis court of common pleas has not jurisdiction of actions, instituted under the act of 1843, to enforce "liens of mechanics in the city and county of St. Louis." Hammond & Judd vs. Barnum, ... 325

JURY FEE.

1. That provision—in the third section of an act of the general assembly, entitled "an act to promote the payment of jurors in St. Louis county," approved January 29, 1847, which requires that a jury fee shall be taxed as part of the costs of every judgment rendered against a defendant in a criminal proceeding—is constitutional--The State vs. Wright 243

JUSTICES' COURTS.

1. Judgment of non-suit given against a party by a justice of the peace, will not bar him from instituting a new suit for the same cause of action--Ellington vs. Crocket 72
2. Authentication, 2.

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3. If a party who appeals from the judgment of a justice of the peace in St Louis county to the court of common pleas, fails to pay to the clerk the jury fee as required by the act approved 29th January, 1847, the court may declare that the judgment of the justice shall be affirmed upon the appellee's filing a proper transcript and paying the fee--Hardison vs. Steamboat Cumberland Valley 227

LANDLORD AND TENANT.

1. Personal property which is necessarily connected with the freehold by a tenant, for the purpose of carrying on the trade or business for which it has been demised to him, (such as a hydraulic press, used by a tallow chandler, let into the ground and walled up with solid masonry, the wooden portion of which was nailed partly to the floor and partly to the rafters of the building) does not thereby "attach" to the realty, but remains the chattel of the out-going tenant, and may be removed by him at the termination of his lease--Finney vs. Watkins 291

LIENS.

1. In order to enforce a lien given by an act entitled "an act for the better securing of mechanics and others erecting buildings, or furnishing materials for the same in the city and county of St. Louis," approved February 24, 1843, the person claiming the benefit of the act, must commence an action within ninety days after filing the lien, Lee & Donohoe vs. Chambers 238

2. By the 30th sec. of the 7th art. of the act concerning "practice and proceedings in criminal cases," the State has a lien upon the property of the defendan, in case of conviction, from the time of arrest or the indictment found, whichever should first happen, which cannot be divested by any subsequent assignment—not even to counsel to assist him in his defence. The arrest of the defendant by an officer without a warrant, is sufficient to attach the lien of the State--McKnight vs. Spain 534

2. The claim of a clerk upon a boat for wages, is not a statutory lien upon the boat; it is only a personal demand against the owners--Steamboat Globe vs. Herbert 577

4. Boats and Vessels, 5.

LIMITATION.

1. In the year 1841, A was residing in the State of Virginia, and owned a negro woman. In the month of March of that year, B stole the woman, and took her to a point near the line between Virginia and Kentucky. At this place, C, a creditor of B, and a citizen of this State, purchased the woman from B, and immediately brought her to this State. C afterwards sold the woman to D, who sold her to E, who sold her to defendant. A died in Virginia, in February, 1846, having never ascertained where his slave was. Plaintiff became the administrator of A, in this State, on the second of April, 1847, and instituted this suit on the 8th of the same month, for two children of the woman; having ascertained the above facts after the death of A. Held, that the statute of limitations commenced running against A from the time B returned to this State with the woman. That, although A did not know where his slave was, and was ignorant of the facts necessary to enable him to institute suit, that ignorance was not occasioned by the improper conduct of the defendant, and did not deprive defendant of protection under the act. That A having died within five years after his cause of accrued, in order to prevent a bar by limitation, plaintiff should have commenced his suit within one year after his death. That it was not necessary for the defendant to make out five years possession by himself in order to get the benefit of the statute; but that it is the failure by the plaintiff to institute suit within the prescribed time that constitutes the bar--Smith adm'r of Taylor vs. Newby 159

2. It is the settled construction of acts of limitation, that when the act commences to run nothing stops it.—Ib.

3. Absence from, or non-residence of a plaintiff in this State, does not prevent the running the statute of limitations.—Ib.

4. The term "beyond sea" in the first section of the "statute of limitation" of 1825, means without the United States." (The cases of Shreve vs. Whittlesey, adm'r of Whittlesey, 7 Mo. Reps., page 473, and Bedford vs. Bradford, 8 Mo. Reps. page 233, are overruled by this decision.)--Marvin, adm'r of Bates vs. Bates 217

5. Adverse Possession, 1.

MALICE.

1. Deliberation, premeditation and malice, may be inferred from the circumstances connected with the killing--Green vs. The State, ... 382

2. If malice appears to have existed at the time of killing, it is sufficient, and it is not necessary to prove that it existed any length of time previous,--ib.

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MASTER AND SLAVE.

1. The master is not responsible for the wilful and wanton acts of his slave, except where the statute has expressly provided. If, therefore, a slave feloniously kills the slave of another, the master of the slave who perpetrated the act is not liable to the owner of the slave killed for the injury he sustained by the loss of his slave--Ewing vs. Thompson, ... 132

MISNOMER.

1. If two names have the same original derivation, and both are taken according to common use to be the same, though differing in sound, the use of one for the other is not a material misnomer--Wilkerson vs. The State, ... 91

MISSISSIPPI RIVER.

1. The Mississippi river, from the northern to the southern boundary of the State of Missouri, is one of the waters of the State referred to in the statute concerning boats and vessels--Swearingen & Couill vs. Steamboat Lynx, ... 519

MORTGAGES.

1. A executed a note to B for the purchase of a tract of land on which C had a mortgage The note was by agreement, to be paid by instalments, to meet the instalments on the mortgage; A failed to pay B, by which B was prevented from paying the mortgage debt. C foreclosed his mortgage, and A became the purchaser of the land which was sold to satisfy the mortgage debt. B obtained a judgment at law, against A upon the note. A filed a bill asking to be relieved from payment of the judgment. Held that A, by his own fault, caused the failure to pay the mortgage debt, and is not entitled to relief--Clark vs. Condit, ... 223

NEW TRIAL.

1. Where the evidence before the jury is such that they might find a verdict for either the plaintiff or defendant, a new trial should not be granted--Fallenstein vs. Boothe--- 427
2. The jury are the proper persons to estimate the value of character, and to assess the requisite or appropriate amount of damages for any injury thereto; and unless their estimate be an exorbitant one, or such an one as at first blush would appear the offspring of malice, or exceedingly improper bias on the part of the jury, it is improper to grant a new trial, ... ib.
3. The overruling a motion for a new trial is properly a subject which comes before the sound discretion of the circuit court; the supreme court must see that this discretion has been abused before it will interfere--Steinman vs. Tolivar,-- 590

NEW MADRID CERTIFICATES.

1. School lands, 2.
2. Spanish grants, 1.

NON-SUIT.

1. A party cannot be compelled to take a non-suit--Martin and wife vs. Henley, ... 312
2. The fact that the attorney of the plaintiff submitted to a non-suit, under a misapprehension of the purport and meaning of an instruction given by the court, is not good cause for setting it aside--Pearce, interpleader, vs. Isaac and James Danforth, ... 360
3. On the evening when the cause was submitted to the jury, the court, by consent, gave certain instructions; the next morning the jury returned into court and informed the court that they could not agree upon a verdict; the court then withdrew the instructions given and gave new ones. Held that the plaintiffs had a right to take a non-suit after the new instructions were given before the jury retired--Hensly & Wright vs. Peck & Barnett, ... 587

NOTICE.

1. A sold to B and C a tract of land---executed a deed acknowledging payment of the purchase money. Below the deed and before the certificate of acknowledgment,

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there was a memorandum (purporting in the body to be the act of both, but was signed by B alone,) stating that one of the payments was still due, and that the land was bound for the payment of it. Before this deed was recorded B and C sold and conveyed the land to D. A filed a bill to subject the land to payment of the purchase money. Held, that the memorandum at the foot of the deed was sufficient to charge D, the subsequent purchaser with notice of the lien··Scott vs. McCullock et al,···· 13

2. Courts may take judicial notice of the abbreviations of a man's christian name··Weaver, to use of Webb, vs. McElhenan,···· 89

3. If the publication of the notice to creditors required by the 20th section of the 2nd article of the act concerning the administration of estates, be not commenced within thirty days after the grant of letters, debts against the estate are not barred, after the lapse of three years··Hawkins & Blackwell, Adm'rs of Blackwell, vs. Ridenhour, ···· 125

4. If an endorser of a negotiable note, with a knowledge of the failure of the holder to make a demand upon the maker or acceptor, makes an unconditional promise to pay; or acts in such way as to show an acknowledgment of his liability, with a full knowledge of his discharge from his responsibility by the laches of the holder, such acts are an implied waiver of due notice of a demand upon the maker or acceptor··S. & W. Wilson vs. Huston,···· 146

5. Bonds and notes, 5.

6. Where A had heard B say that he had an unrecorded deed for certain lands, it is sufficient to charge A, who subsequently purchased the lands, with actual notice of the title of B··Mense vs. McLean,···· 298

7. Bona fide purchasers, 1.

8. Change of venue, 2.

OFFICER.

1. Upon the trial of a suit brought by an execution creditor against an officer upon his bond, for a failure or refusal to execute a writ, the return made by the officer upon the writ, is evidence in his favor to show an excuse for not executing it··The State, use of Kirkland, vs. Ferguson et al.,···· 166

2. An officer has until the return day of a writ, to execute it; and if within a few days previous to the return day he be restrained from further proceedings upon it, by injunctions, he is not liable for failing to execute it sooner, unless the plaintiff shows special circumstances which would make it his duty to execute it sooner, and his refusal and that in consequence thereof, the plaintiff has suffered loss··ib.

3. Where an officer under color of his office proceeds to execute process and collect money under it, his securities are liable for a misapplication of it, although the writ may be defective, erroneous, or even totally illegal··Rollins et al. vs. The State, use of Duvall, et al., ···· 437

4. The mere application to the court by the plaintiff for an erroneous or illegal order, upon which a writ issues, is not such an interference as makes the executive officer his agent··ib.

PARTITION.

1. Plaintiffs, heirs of A, joined others in a suit for partition of certain lands; an order of sale was made; before the sheriff made his report of the sale, defendant, who was the administrator of A, applied to the court for an order that the proceeds of the sale going to the heirs of A should be paid over to him for the benefit of the creditors of A. The court, having been first satisfied that the estate was insolvent, made the order. Held, that the order, although somewhat informal, must stand, complete justice having been accomplished by it··Langham vs, Darby,···· 553

PLEADING.

1. Profert, 1.

2. A petition under the act to reform pleadings and practice, must substantially set forth facts which, under the rules and principles of law, would entitle the plaintiff to a judgment··Biddle vs. Boyce, ···· 532

PRACTICE.

1. No ground of error will be considered in the supreme court which has not been assigned and relied upon in the court below··Lang vs. Story, adm'tx of Story dec'd·· 4

2. Where a chancellor directs issues of fact to be made, which are tried by a jury, the finding is to be regarded as verdicts at common law. The supreme court will not disturb them except in a case of clear and improper finding, or of misdirection by the court··O'Bryan vs. O'Bryan···· 16

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3. A suit on behalf of a lunatic must be instituted in the name of the lunatic, and not in the name of the guardian··Reed, guardian of Tolson vs. Wilson & Garner····· 28
4. In an action of replevin, "where the plaintiff fails to prosecute his suit with effect," the assessment of damage is imperative, and may be made by the court, if neither party requires a jury··ib.
5. A bill, which seeks to establish, against several persons, demands which are similar, based upon the same facts, and growing out of, and depending upon the same principles, is not multifarious··Martin vs. Martin, adm'r of Martin···· ····· ····· ···· 36
6. Justices courts, 1.
7. Non-suit, 1.
8. In order to correct an error of the circuit court in improperly granting a new trial, the party complaining should tender his bill of exceptions, and abandon the case at that point··Martin and wife vs. Henley···· ····· ···· ····· ····· ···· ····· ··· 312
9. Change of venue, 4.
10. In order to correct errors of the circuit court in excluding or rejecting testimony, or in giving or refusing to give instructions, the party complaining must file his motion for a new trial··Pogue vs. The State, use of Harbin···· ····· ···· ···· ···· ···· .. 444
11. Under the late act concerning pleadings and practice, although the bond or note which is the foundation of the action is to be filed, it does not become a part of the petition, nor is it necessary that it should be included in the copy of the petition which goes out with the summons··Hadwen vs. Home Mutual Ins Com···· ···· ···· ···· 473
12. Plaintiff after giving his evidence took a non-suit, and before the jury had dispersed but after the non-suit had been entered upon the minutes, he moved the court to cancel the order of non-suit and allow the cause to proceed; this the court refused; although in matters of practice much latitude is allowed to circuit courts, in this case the reasons for the application, as appear in the record, make it manifest that the substantial ends of justice would have been promoted by cancelling the order, therefore the judgment of the court is reversed··Collier vs. Swinney···· ···· ···· ····· ···· 477
13. A party is not bound to read the whole of a record offered by him in evidence, but only such parts as he may deem necessary to prove the facts which he desires to establish; the opposite party has a right to have the balance read or such parts as he may deem material to his side of the question··Haile vs. Hill et al.···· ···· ····· ··· 612

PRACTICE IN THE SUPREME COURT.

1. Where the objection to evidence is irrelevancy to the issue, the supreme court cannot settle the point unless all the evidence in the cause is preserved in the bill of exceptions··McMillen vs. The State···· ····· ····· ····· ····· ····· ····· ····· ··· 30
2. Practice, 1.
3. Where no part of the evidence given on the trial of a cause is excepted to, and no instructions are asked, the supreme court will not disturb a verdict found by the court sitting as a jury, if the evidence warrants it··Reed & Reed vs. Harrington···· ···· 93
4. Unless the objections made in the circuit court to the reading of depositions specially point out the grounds of objection, the supreme court will not consider them··Duvall vs. P. & T. Ellis····· ···· ····· ····· ···· ····· ····· ····· ···· ···· ····· 203
5. Instructions, 3.
6. Where an appellant makes no point for the consideration of the supreme court, and the record presents no error, the judgment of the court must necessarily be affirmed··Isbell vs. The State···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ··· 221
7. Amendment, 2.
8. Instructions, 4, 5.
9. Evidence, 14.
10. Where no bill of exceptions is preserved, and where the record does not show any exceptions taken by the plaintiff in error to the opinions or decisions of the circuit court upon motions made by him, the judgment must be affirmed··Cannon vs. The State. 421
11. The supreme court will not consider any thing as a ground for reviewing a proceeding or judgment of the circuit court which has not been finally passed upon by that court, either in a motion for a new trial, if the alleged error has relation to proceedings during the trial, or in arrest of judgment if relating to pleadings··Warner vs. Morin···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ··· 455
12. Where the circuit court upon the last day of the term refused to enter upon the trial of a jury cause, and continued it, it is a discretion which the supreme court will not interfere with, if it is manifest that the party complaining sustained no injury··Hall vs. Woodson, adm'r of Scott···· ···· ···· ···· ···· ····· ····· ···· ···· 462
13. Practice, 12
14. If no exception be taken to the decision of the circuit court at the time it is made, the supreme court will not review it··Gates et al vs. Hunter et al···· ····· ····· 511
15. Where the circuit courts refuse to set aside a judgment by default, the supreme

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court will not interfere, unless it appears that injustice has been done to the party complaining··Faber vs. Bruner···· 541
16. Bill of exceptions, 2.
17. Where the merits of the case have been fairly placed before the jury the supreme court will disregard all informality in making up the issue··Darby vs. Charless···· 600

PRESUMPTION.

1. Where a father upon the marriage of his son, delivers to him a slave without any explanation at the time of his intention whether it is a gift or a loan, the presumption of law is that it is an absolute gift; and where the property thus delivered, remains a considerable length of time in the possession of the son, it should require the clearest, most direct and uncontradictory evidence to rebut this presumption··Martin vs. Martin, adm'r of Martin···· 36

PRINCIPAL AND AGENT.

1. When the affidavit required, by the administration act, of a claimant presenting a demand against an estate for allowance, is made by an agent it must appear from the affidavit itself that the agent had "the management and transaction of the business out of which such demand originated," or that he "had the means of knowing personally the facts required to be sworn to."··Peter (of color) vs. King, adm'r of Evans···· 143
2. Although an agent at the time he makes a verbal contract discloses to the other party his agency, and gives the name of his principal, it does not necessarily follow that he is not personally liable. Whether the credit was given to the agent or his principal is in such cases a question of fact to be determined by a jury from the conversation and acts of the parties at the time of making the contract··Hovey vs. Pitcher···· 191
3. A person indicted for selling liquor without license, cannot excuse himself upon the ground that at the time he did the act he was in the employ of another person, and sold it as the agent of that person··Hays vs. The State···· 246
4. Trustee, 4.
5. Sheriff, 5.
6. Slaves, 2.
7. Bills of Exchange, 1.
8. Defendant employed an agent to sell for him a stock of goods in the city of St. Louis; to facilatate the sale, the agent purchased from the plaintiffs and others, additional goods "in his own name;" defendant afterwards knew of the purchases and sanctioned them by his consent. Held that he is liable for the purchases thus made··Little vs. Stettheimer & Brother···· 572
9. A factor must strictly follow the orders and instructions of his principal, and a departure from them will be at his own risk. If he does with proper care and diligence, faithfully and *bona fide*, carry out the orders of his principal, and yet a loss accrues, it must fall upon the principal··Sigerson vs. Pomeroy & Andrews···· 620
10. Whether a factor obeys or disobeys the instructions of his principal is a question of fact for the finding of the jury··ib.

PRINCIPALS AND ACCESSORIES.

1. All persons who are present at the time of killing are principals, although only one perpetrated the act, provided all are proven to have conferated and engaged in a common design, of which the act of killing is a part··Green vs. The State···· 382

PRINCIPAL AND SURETY.

1. No delay on the part of the creditor, will operate to release the security, which would not act as a bar for the principal··Hawkins & Blackwell, adm'r of Blackwell vs. Ridenhour···· 125
2. Plaintiff and defendant were bound as securities; plaintiff accepted a conveyance of property from the principal debtor, to indemnify him as security; the trustee, under the direction of plaintiff, sold the property for an amount sufficient to pay the debt, but never collected the money; plaintiff paid the security debt and brought assumpsit against the defendant for contribution. Held that the action could not be maintained··Chilton's adm'rs vs. Chapman···· 470

PROFERT.

1. If the plaintiff fails to make profert of the instrument of writing mentioned in his de-

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claration, and which is the foundation of his action, it is a substantial defect in the declaration--McCormick vs. Kenyon & Rockford 131

REPLEADER.

1. Courts should not award a repleader, unless the ends of justice require it--Walker vs. Seymour 592

REPLEVIN.

1. The judgment required by the 8th section of the act regulating the action of replevin, in case the plaintiff fails to prosecute his suit with effect and without delay is a final judgment. When such judgment is rendered by the Law Commissioner for the county of St. Louis he cannot set it aside--Maids vs. Watson 544

SCHOOL LANDS.

1. A became the purchaser of certain school lands in the county of Chariton:—he executed bonds for the purchase money, to the county for the benefit of the inhabitants of the township, in which the land lies. On the 6th day of February, 1847, the General Assembly of the State, passed an act, which "authorized and required" the county court of Chariton county, to make an order rescinding the contract of sale to A, and to cancel the bond for the purchase money. Held that the above act of the General Assembly is unconstitutional, and that the inhabitants of the township are entitled to the accrued interest upon the bond--Butler, relator vs. Chariton county court 112
2. The title of the State of Missouri to the 16th sections granted by the act of Congress of March 6, 1820, for school purposes, is not impaired or destroyed by the previous location of a New Madrid certificate upon these sections--Kennett et al vs. Cole county court 139

SEAL.

1. To authenticate a public record by the private seal of an officer, the sealing should be by an impression upon wax or other tenacious substance. A scrawl is not sufficient--Gates vs. The State 11

SEARCH WARRANT.

1. A search warrant is not admissible in evidence for any purpose, unless it appears to have been founded upon the proper oath--Halsted vs. Brice 171
2. If any person other than a public officer be deputed to execute such a search warrant, the deputation is totally void; and if such person in executing the warrant commits a trespass, or do any tortuous act upon the property of another, the warrant will neither justify, excuse, or mitigate the act.—ib.

SHERIFF.

1. A sheriff during his first term, made a sale of real estate, on credit, under the statute concerning partition. He was elected for a second term and gave a new bond: during the second term he collected the money and failed to pay it over.
Held, that the failure to account for the money was a breach of his first bond, and his securities in that bond are liable for the breach; that all the acts done by the sheriff in the matter during the second term, were only in completion of the duties incurred under the first bond.
2. The legislature may enlarge the duties of sheriffs during the term for which they are elected, and their securities are liable for the faithful performance of them--Marney et al vs. State, use of Vance 7
3. Bankruptcy, 1.
4. Trustee, 6.
5. Where a plaintiff, in an execution, or his attorney directs a sheriff to proceed under it, in some way other than that prescribed by law, he makes the sheriff his agent, and the securities of the sheriff are not liable for his acts--Rollins et al vs. The State, use of Duval et al 437
6. A sheriff having in his hands an execution against A, and having received money for him under an execution in which he was plaintiff, although the money before being paid over to A cannot be levied upon, the court may direct it to be paid over upon the execution against him, unless the legal and equitable right to it has passed to some third person--Ex parte Fearle vs. Lewis 467

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SLAVES.

1. If a person sells intoxicating liquors to a slave, without permission from his master, owner or overseer, by which he is made drunk, and of which he dies, such person is liable to the owner for all the legal damage that may thence ensue--Skinner et al vs Hughes..... 440
2. Where a clerk in a store is in the habit of selling whiskey to slaves, without permission from the masters, owners or overseers thereof, and his employer knows of such habit and does not stop it—it is evidence of the employer's agency in such sales and is sufficient to charge him with the consequences--ib.
3. Contribution, 1.

SLANDER.

1. In an action for slander the defendant, upon the trial of the issue, made upon the plea of not guilty, may prove that the publication of the words set forth in the declaration was procured by the fraudulent contrivance of the plaintiff himself, with a view to an action--Sutton vs Smith..... 120
2. In actions of slander, the words spoken are to be construed according to their natural meaning and common acceptance. The old doctrine, that words spoken slanderously are to be taken in *mitiara censu*, has long since been abandoned--Fallenstein vs. Booth..... 427

SPANISH GRANTS.

1. A claim to land by virtue of a Spanish grant and confirmation, described as follows: "30,000 arpents 60 miles above the Osage, on the south side of the Missouri river, in which quantity should be comprised the river a La Mine, and also the salt springs which he designed to work." &c., is not sufficiently specific to bring it within the reservations of the act of Congress of February 15, 1811, so as to prevail against a New Madrid location. The claims reserved by the act of 1811, were such as had a fixed locality, or could be reduced to a certainty by a survey--Ashley et al. vs Turley, and four other cases..... 430

STAKE HOLDER.

1. Where a person deposits money with a stake holder to be held to abide the result of a horse race, he may institute a common law action and recover the same at any time before the bet has been determined. Such recovery may be had without reference to any provision in the act concerning gaming--Humphrey vs. Magee..... 435
2. If the bet was made in the name of the plaintiff, the fact that others were interested with him in the bet, does not make it necessary that they should join in the suit--ib.

ST. LOUIS COMMONS.

1. The title of the inhabitants of St. Louis, to the *commons* adjoining the town, under the act of Congress of June 13, 1812, must prevail over a title confirmed by the act of Congress of July 4, 1836--Swartz vs Page..... 60
2. A deed regular on its face, from the city of St. Louis under its corporate seal, for a part of the commons, executed under the provisions of an act of the general assembly of this state, approved March 18, 1835, is prima facia evidence that all the prerequisites of that act required before a sale, have been complied with. Nor can a claimant be allowed to urge that the prerequisites have not been complied with unless he holds a conflicting title from the city--ib.

ST. LOUIS COURT OF COMMON PLEAS.

1. Jurisdiction, 2.

STATUTE OF FRAUDS.

1. A sheriff's sale is within the statute of frauds, and the title to land can only pass by a deed duly executed: when a deed is made it relates back and takes effect from the sale only so far as to affect parties and privies, and not to defeat the rights of intervening purchasers--Hartt vs Rector & Dobbin..... 498

TRUSTEE.

1. If a trustee purchases trust property by him sold at public auction, in accordance

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with the trust, and immediately sells it to another, for an advance price, pursuant to an arrangement previously made with such other person that he should not bid at the sale, and in consequence of which the trustee purchased the property for less than its value, a court of equity will compel the trustee to account to the *cestui que trust* for the advance upon his purchase··Wasson et al. vs. English et al ····· ···· ····· 176

2. Where a debtor without the knowledge of his creditor conveys property to a trustee to secure the debt, it is valid, unless within a reasonable time after the fact comes to the knowledge of the creditor, he disclaims it··Major vs. Hill et al····· ···· ····· 247

3. Where a debtor conveys property to a trustee, to secure specified debts, after those debts are satisfied from the proceeds of the property, the balance, if any, should be appropriated in payment of such executions, as would have priority of lien upon the property.—ib.

4. Where a trustee is authorized by a deed of trust to appoint agents or substitutes to assist in the management of the trust business, and he accepts the trust upon the express condition that he shall not be responsible for the negligence or malfeasance of any person except himself, should an agent or substitute appointed by him be guilty of malfeasance, a court of chancery will not hold him liable··O'Fallon & Polk vs. Tucker···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· 262

5. Conveyances, 1.

6. A debtor executed and delivered for record a deed of trust conveying certain property to pay a specified debt. On the same day that the deed was executed, the sheriff, by virtue of an attachment, took possession of the property. Held, that in a controversy between the attaching creditor and the trustee, there being no evidence upon the point, the possession of the sheriff is prima facie evidence that he seized the property at an earlier hour of the day than the deed of trust was delivered for record; and that it devolves upon the trustee to show a precedent right··Pearce, interpleader vs Isaac & James Danforth···· ···· ···· ···· ···· ···· ···· ···· ···· ···· ···· 360

7. Facts stated and discussed which the court considers insufficient to charge a party as trustee··French, adm'r of Hardeman vs. Campbell's heirs···· ···· ···· ···· ···· 485

8. A trustee cannot prove by parol testimony, without the aid of the record of the suit itself, the amount of costs incurred in a suit instituted by him to recover the trust money··Gates et al vs Hunter et al····· ···· ···· ···· ···· ···· ···· ···· ···· ···· 511

9. Where a trustee is required by the terms of the trust to invest a specific amount of money in lands, he is not warranted in investing part as directed, and expending the balance in improving the land purchased, unless peculiar circumstances should require it··ib.

10. Where by the terms of the trust the trustee is required to invest a certain amount of money in funds for the benifit of persons part of whom are minors, he should be required to invest the full amount, although a portion of those of full age request to receive their shares in money··ib.

VARIANCE.

1. The declaration averred that the defendant, on &c., at &c., by his writing obligatory, sealed with his seal, &c., obligated himself to pay, on &c., to A for value received, one thousand dollars, and then and there delivered the said bond, &c. The bond offered in evidence, in addition to the above, contained the words "without defalcation or discount," held that as the declaration did not profess to set out the bond in so many words, but only its substance, the variance between the bond described in the declaration and the one offered in evidence, is not material···Powers vs. Browder, adm'r &c···· ···· ···· ····· ···· ···· ···· ···· ···· ···· ···· ····· ···· ···· 154

VERDICT.

1. Where a verdict of a jury is substantially defective in omitting to find a material issue, the circuit court cannot supply the defect; but where a verdict is merely informal, the court may put it in proper form···Henley vs. Arbuckle, guardian of Mobberly 209

2. A substantial omission in the verdict of a jury may be supplied by the court, with their consent, so as to make it conform to their intention···ib.

WAIVER.

1. Change of venue, 1.

2. Defendant leased to plaintiff, for twelve months, a hotel, the rent to be paid monthly—amongst other things, plaintiff covenanted to have certain work done about the house, after the first month's rent was received. This was not done. At the end of the year, in accordance with a stipulation in the lease, the lease was renewed for two years; the new lease contained a covenant to have the same work done. Held, that the renewal of the lease with a new covenant to do the same work stipulated for in the first, was not waiver of the damages sustained by plaintiff by reason of a breach of the covenant in the first lease···Walker vs. Seymour···· ···· ···· ···· ···· 592

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WARRANTY.

1. Defendant executed a deed to plaintiff, in which he acknowledged the receipt from plaintiff of six hundred dollars, and warranted to him a pre-emption title to a quarter section of land. Owing to conflicting claims to the land, the plaintiff was enabled to enter only eighty acres of the land described and eighty adjoining it. Plaintiff instituted an action of assumpsit upon the common counts to recover the six hundred dollars.
Held, that the action could not be maintained···Templeton vs. Jackson····· 78

WILLS.

1. John Taylor made amongst others, the following provisions in his will: "Sec. 7. I leave and bequeath to my grand-son, John Hill, the west half of the north-east quarter of section 27, town. 51, range 29; also one negro boy named Clark (son of Nell,) to be given into his possession when he arrives at the age of twenty-one years, to him and his heirs forever."
Sec. 9. I will that all my personal property of every kind, not otherwise disposed of, be sold as soon as practicable, after my death, on a credit of twelve months, my executor taking bond and approved security; and from the proceeds thereof and the money in hand at my death, I desire that all my just debts be paid, and the balance, if any, to be equally divided amongst my children and grand-children, each grand-child drawing their equal proportion of what their ancestors would have drawn had they have lived.
Sec. 11. There are yet three negroes not disposed of, to-wit: James, Nell and Tom. It is my will that they be hired by my executor in the county of Ray, either at public auction or privately, as my executor may think most advisable, every year from my death, until my grand-son, John Hill, comes to the age of twenty-one years; then it is my will that they be sold, &c., &c., and the proceeds arising from such sale, to be equally divided amongst my children, and grand children, as before directed, in the ninth article of this will.
Held, That the legacy mentioned in the 7th article is a vested one, and that the hire of the slave Clark, from the death of the testator, passed with the slave to the legatee: a fund having been otherwise provided for the payment of the debts and expenses. 2. That by the ninth article the grand children take *per stirpes*, that is, the share of the deceased parent. 3. That the sale of the slaves mentioned in the 11th article and division of the proceeds as therein directed, could not be made until the period at which John Hill would attain to the age of twenty-one years. The postponement being made on account of the condition of a majority of the legatees, the death of John Hill during his minority would not change the period fixed in the will for the sale and division···Hamilton, ex'r of Taylor vs Lewis, Pub. Adm'r····· 184
2. A by his will devised to his son B. and to his daughter C, in equal moities, a tract of land, with the provision that "if his said daughter should marry or die," the land should belong exclusively to his said son. Held, that the above condition attached to the estate of the daughter, is in restraint of marriage, and is void···Williams & Williams vs. Cowden····· 211
3. Testator died in the State of Kentucky, having devised his real estate to his widow during life or widowhood; by legislative and judicial proceedings had in that State, the widow was empowered to sell the land and invest the proceeds in lands in this State. Held, that the money in the hands of the widow is to be regarded as real estate···Gates vs. Hunter····· 511
4. Bar, 2.
5. The probate of a will in another State is to be regarded as a "judicial proceeding" to the record of which "full faith and credit" is to be given when certified comformably to the act of congress of 1790···Haile vs Hill, et al····· 612

WITNESSES.

1. In discrediting a witness, a party is not restricted to inquiries into his character for truth; the inquiry may extend to his moral character generally··The State of Missouri vs. Shields, appellant····· 236
2. For the purpose of discrediting a witness a party my inquire as to her general character for chastity···ib.
3. A witness who is interested in a suit is competent to testify when called upon by a party claiming against his interest···Haile vs Hill, et al····· 612

WRITS OF ERROR.

1. The statutes of this State have fixed no limitation to writs of error *coram nobis;* the writs barred by the statute are those only which are brought to correct errors of law···Powell vs. Gott····· 458

APPENDIX.

☞ The following statement of the case of Bogy vs. Shoab, which was accidentally omitted in its proper place in the report, is here inserted by direction of the court:

STATEMENT.

This was an action of ejectment brought by the plaintiff against the defendant in error in the St. Louis court of common pleas, to recover a lot of ground in the city of St. Louis, within United States survey, No. 671, for Pierre Chouteau. A judgment having been rendered in favor of the defendant, the plaintiff prosecutes his appeal.

The questions presented by the record depend upon the construction of deeds and other documents given in evidence at the trial, and will be most readily understood by stating the material parts of these instruments in the order of their dates.

On the 16th of October, 1799, there was granted to Pierre Chouteau, by the "Lieut. Governor," a piece of land, bounded north by the line of Mr. Labeaume's tract, (now survey 181) east by the river Mississippi, and west by the domain of His Majesty—the said land running on the heights and at the distance of six arpents from the river.

The surveyor, Don Antonio Soulard, was directed to put the grantee in possession, and deliver to him a certificate thereof.

The order was executed—a survey made on 10th March, and the plat certified on the 17th June, 1803.

The survey was made without regard to the variation of the needle, and contains 133 arpents. That survey is represented on a connected plat given in evidence at the trial, exhibiting the location of Labeaume's tract on the north of Roy, Eglij and others on the south, and the common fields on the west.

By reference to the connected plat, it will be seen that the south line of the Spanish survey, being the north boundary line of Roy and Eglij survey, No. 181 and 1416, does not extend to the east line of the common fields by one arpent or more, and that the west line crosses the east boundary of the common fields, and includes about eighteen and a quarter acres of the common fields. The north line corresponds with the south boundary of Labeaume's tract, survey No. 2974.

It appears by the records of the board of commissioners that Pierre Chouteau, in due time, presented his claim, under the concession and survey, to the board, and that on the 9th January, 1809, the claimant relinquished 39 arpents and 39 perches of the land claimed, which interferes with land already surveyed, leaving the quantity at present claimed, 93 arpents and 1 perch.

On the 17th February of the same year, the board, after rejecting an interfering claim by Jacques Clamorgan, assignee of Esther A. Mulatress, unanimously confirm to Pierre Chouteau, 93 arpents and one perch, and order them to be surveyed so as not to interfere with the field lots of the little prairie of the town of St. Louis.

On the 29th May, 1811, the commissioners ordered the survey to be made at the expense of the United States, and on the same day issued a certificate of confirmation and order of survey (No. 671) according to the decision.

While the claim was pending before the board, Pierre Chouteau and wife, by deed bearing date the 3d August, 1808, acknowledged and recorded the same day, conveyed to Merriwether Lewis in fee, "a tract of land adjoining the town of St. Louis, bounded as follows, commencing at a stone in Anto. Roy's upper line, thence running south 67° 30' west, forty five perches to a stone in the line seperating the town lots from the lots which have been granted for cultivation, thence north 21° 30' west seventy-two perches to a stone in said line, thence north eastwardly forty-five perches to a stone, thence sixty-five perches to the beginning, containing thirty arpents and ninety-three perches (French measure) in superficie." This deed contains a covenant against all claims, (except of the United States, and a special covenant to defend the consideration money, $248) if the claim should not be confirmed by the commissioners.

On the 24th December, 1810, Pierre Chouteau and wife, by deed of that date, conveyed to William C. Carr, in fee, "a certain tract or parcel of land, lying and being in the district of St. Louis, about twelve arpents north of the town of St. Louis, bounded as follows, to wit: Beginning on the bank of the river Mississippi at the corner of Mary P. Leduc's tract, and running westerly six arpents in depth to a stone, thence northerly five arpents and three quarters of an arpent to a stone, thence easterly six arpents to the bank of the Mississippi river, and thence with the meanders of said river to the beginning, said tract containing about thirty-four arpents and a half, being a part of a larger quantity granted to the said Pierre Chouteau by a concession from Charles Dehault Delassus, Lieutenant Governor, &c.,—the 16th October, 1799; this deed contains a covenant of general warranty—it was acknowledged and recorded the 27th September, 1817."

On the 30th November, 1815, Pierre Chouteau and wife, by deed of that date, acknowledged the same day and recorded the next day, conveyed to Frederick Bates, in fee, free and clear of all incumbrances whatever, "a certain tract or parcel of land, containing twenty-one arpents, French superficial measure, be the same more or less, situate, lying and being about twelve arpents north of the aforesaid town of St. Louis, bounded as follows, to wit: eastwardly by the river Mississippi, and southwardly by a tract of one arpent fronting on said river, belonging to the said Peter Chouteau, sold to Merriwether Lewis, and the field lots or road, if any there be, between the said field lots and the aforesaid bargained premises, and northwardly by land which the said Peter Chouteau sold to William C. Carr," it being a part of a larger quantity granted to the said Chouteau by the concession of 16th October, 1799, and surveyed 10th March, 1803, as before mentioned.

The United States survey, No. 671, purported to have been made in conformity with the confirmation to Chouteau, was returned on the 2d April, 1817. It corresponds with the Spanish survey in the southern and part of the western boundary. It excludes not only all the Spanish survey, within the common fields, but also about thirteen acres adjoining the southern line of Labeaume, as appears by the connected plat certified by the Surveyor General.

On the 10th of August, 1817, Pierre Chouteau and wife, by deed of that date, conveyed to Manuel Lesa, a certain piece of land situate north of the town of St. Louis, bounded and limited as follows, to-wit: south by lands belonging to Madame Veuve Roy; north by that of Mr. Federick Bates; west by land formally by (the grantee) sold to Meriwether Lewis; east of the Mississippi "for the said Manuel Lisa, his heirs and assignees, to enjoy in full property and as a thing to him belonging, the piece of land contained between the lines above described, without the quantity being exactly fixed." This deed contains a covenant against incumbrances and was acknowledged on the day of its date and recorded the 23d August, 1817.

Pierre Chouteau and wife, by deed dated, acknowledged and recorded 22d September 1818, conveyed to Auguste P. Chouteau in fee, a parcel of land situate "at a place called Lagrange de Terre, in the county of St. Louis, north and near the town of St. Louis, containing twenty arpents in superficie, and bounded on the south by land which the grantors had sold to William C. Carr; east by river Mississippi; west by the forty arpent lots, and north by land which the said Peter Chouteau acquired of Joseph Brazeau, and the ditch of the land formerly belonging to Louis Labeaume and in which aforesaid twenty arpents, or more if it shall be found there, is included all the mound called the Lagrange de Terre, which parcel of land

above sold, being the part the most north and the residue of the concession which was granted to said Chouteau by M. Charles Dehault Delassus, former Lieut. Governor, 16th October, 1799, and surveyed by Soulard, 10th March, 1803." This deed is made in consideration of $500 and contains a covenant of warranty against incumbrances and all claims whatsoever.

Auguste P. Chouteau, the grantee in the last deed and his wife Sophie Labadie, had entered into a marriage contract previous to their marriage—which contract was given in evidence and bears date the 15th of February, 1809, was executed before a notary and in the presence of the parents and friends of the contracting parties and was recorded on the day of its date in the office of the recorder of St. Louis county. It was formally proved by a subscribing witness on the 21st March, 1838, and again filed for record, and recorded the same day—this instrument after reciting the engagement of its principals and the consent of the parents, provides that after the celebration of the marriage, the future husband and wife shall be one and common, in all property moveable and immoveable, acquisitions, purchases and things of their (own) which they may have acquired during the community which shall be regulated according to the laws. It is then declared that the future husband brings into the community, which is to be established, one thousand dollars, and on the part of the future wife, Pilagie Chouteau, widow Labadie, her mother gives as a dowry to said future husband, for the benefit always of the future wife, $2,973 18¾ in shaved deer skins at 2½ pounds to the dollar, for her part of the succession of Sylvester Labadie.

The future husband then promises to give to the future wife on the day of the nuptial benediction, one thousand dollars to dispose of at her pleasure—which donation shall nevertheless belong to the children which may be born of the marriage; and the future wife shall have the right in renouncing to said community to take back all that she may have brought to said marriage, and that which may come to her by legacies, successions, donations or otherwise, even the thousand dollars above mentioned, discharged of all debts of the community. The parties then made a mutual donation to the survivor of all their property, to be void however, if there should be any child living, born or to be born, of the said marriage, and in that case the survivor would be limited to the clauses, conditions stipulated in the contract.

On the 28th Dec., 1822, Pierre Chouteau and George F. Strother entered into an agreement or writing, by which said Chouteau, in consideration of $560 paid and $3,945 to be paid, stipulated that he, his heirs and assignees, and all and every person claiming an interest in two tracts of land thereafter mentioned, would, at the cost of said Strother, before the first of March, then ensuing, by such conveyances as Strother should reasonably require, convey and assure a tract of 4 arpents front and forty deep, lying upon Vide-road, containing 160 arpents, and a tract or parcel of land lying upon the Mississippi, extending upon the bank of the river from the tract of land sold by the said Chouteau to William C. Carr, to a tract formerly sold by Labeaume to William Christy, according to conveyance from Brazeau to Labeaume, and running with each of these lines back to embrace the big Mound—the said tract of land to contain at least 30 arpents—with covenant against incumbrances and all other and reasonable covenant.

By the same agreement Strother bound himself to convey to Chouteau, a house and lot in the town of St. Louis, purchased of Hughes and Morris at the price of $650—to assign two thousand two hundred dollars in promissory notes or bonds due from persons residing in the State of Missouri, to pay $350 when the deeds are executed, and $740 sixteen months thereafter.

On this agreement there are two endorsements, both signed H. Cozens.—"The first states that on the 11th January, 1823, Strother conveyed to Chouteau the half square therein mentioned, by him purchased from Hughes and Morris, administrator." The other is as follows: "Jan'y 14, By order of Sylvester Labadie upon Chouteau, forty-five dollars—By fifty dollars paid Hempstead and Giddings for Mr. Chouteau."

A patent was issued on the 26th of March, 1824, granting to Pierre Chouteau the land embraced in survey No. 671.

By a deed dated 1st June, 1826, acknowledged the same day and recorded the 22d of the same month—Pierre Chouteau and wife, in consideration of $1000, bargained and sold to George F. Strother, his heirs and assignees, the following tracts or parcels of land granted to said Pierre Chouteau by Charles Dehault Delassus, the Spanish Commandant—"beginning at

Roy's line, north to Labeaume's south line, and extending from the river to the common field lots west, it being intended hereby to convey to the said George F. Strother, his heirs and assignees, all the land contained within said concession, except that heretofore sold by the said Pierre Chouteau, according to his said several contracts, to be limited by the metes and bounds marked and fixed by the intention of the said parties at the period of contracting." And one other tract of land, containing 4 arpents, running on the river, and running back west 4 arpents, making 16 arpents between the north line of said first mentioned tract of land, and the south boundary of the tract of land sold by Joseph Brazeaux to Labeaume—the said 16 arpents being a tract or parcel of land confirmed to Joseph Brazeaux, and sold and conveyed by said Joseph to Pierre Chouteau.

After the habendum, there is this covenant—"And the said Pierre Chouteau and Brigite, his wife, do hereby warrant the same free from the claim of themselves and all persons claiming under them, except those who may have deeds recorded in the clerk's office of St. Louis, according to the modifications of said claims aforesaid described"

On the 3d September, 1830, George F. Strother and wife, by deed of that date, conveyed to John Mullanphy and John O'Fallon, all their rights, title, interest and claim, and demand whatsoever, in and to the following pieces or parcels of land, to-wit: all that tract or parcel of land granted to Pierre Chouteau, describing the land precisely as in the deed from Chouteau to Strother, and with the exceptions in the same words, adding, and also with the reservation of a parcel of said land contracted to be sold by said George F. Strother to Martin Thomas, as surveyed by Rene Paul, as follows—giving the boundaries—containing five acres and ninety-two hundredths of an acre—also another tract of land, containing four arpents, running on the river, and four arpents running back, making sixteen arpents, between the north line of the first tract of land sold by Joseph Brazeau to Louis Labeaume, and being parts of the same tracts and parcels which said Strother purchased from Pierre Chouteau and Brigite, his wife, by deed bearing date 1st June, 1826.

The conveyance is declared to be "in trust for the sole use, benefit and behoof, of and for *the* St. Louis Marine Railroad Company, the trustees to obey the written instructions of the company, to rent, mortgage, sell or dispose of the same as the company should direct in writing, amount for the proceeds, &c. The deed contains a specific warranty against all persons claiming from, through or under the grantors.

On the 22d Febrary, 1831, George F. Strother and wife, by deed, conveyed to Martin Thomas and Aaron Coon, all the right and title of the grantors in or to the tract excepted in the preceding deed, as having been sold to Martin Thomas and surveyed by Rene Paul, containing five acres and ninety-two hundredths of an acre, with warranty against all persons claiming from, through or under the grantors—the land to remain mortgaged to secure the payment of certain notes. This deed was acknowledged on the 24th, and recorded on the 25th February, 1831.

A deed bearing date 15th March, 1838, to which A. P. Chouteou and Sophie, his wife, subscribed their names and affixed their seals, was acknowleged by said Auguste P. Chouteau on the same day, but was never acknowleged by Sophie, his wife. This deed purports to reconvey to Pierre Chouteau the same land which he had conveyed to Auguste P. Chouteau on the 22d September, 1818, with warranty against incumbrances and all claims whatsoever—this deed was recorded 26th November, 1845.

After the death of Auguste P. Chouteau, his widow, Sophie Chouteau, by her deed dated 20th November, 1845, conveyed to Louis V. Bogy, the plaintiff, all her estate and interest in the land which had been conveyed by Pierre Chouteau to A. P. Chouteau on 22d September, 1818. This deed was acknowleged on the day of its date, and recorded on 26th November, 1845.

On the 20th November, 1845, Pierre Chouteau, by deed of that date, conveyed to Bogy, the plaintiff, all his right and title in and to the same land by the same description—this deed was acknowledged on the 21st, and recorded on the 26th Nov., 1845.

This suit was commenced on the 10th January, 1846, and on the 17th of September, of the same year, the plaintiff, Lewis V. Bogy, and his wife, executed a deed, reciting the execution of the deed by Pierre Chouteau to said Bogy, and its description of the land conveyed, by its boundaries, "being the same which was formerly conveyed by said Pierre Chouteau to

his son, Auguste P. Chouteau, by deed dated 22d September, 1818, (referring to the record) —the title to the same having been reconveyed to the said Pierre Chouteau by the said A. P. Chouteau, and by Sophie Chouteau, the wife of said A. P. Chouteau." The deed then proceeds—"Whereas, the said conveyance from the said Chouteau to said L. V. Bogy, was made upon certain agreements and stipulations made between them, which requires that the said Chouteau should have the control over, and the disposition of the said tract of land, in order to accomplish his purpose in relation to enjoyment of said land—therefore, said Bogy covenants that he will reconvey said land to Chouteau or his assignees in fee simple, so that the title shall be reconverted in him, or shall be invested in any person who shall be appointed by said Chouteau, and that he, Bogy, will execute a quit claim deed when required. By the same deed, Pilagie Bogy, wife of said Lewis, relinquishes to said Chouteau the right of dower in the land. The deed was acknowleged 18th September, 1846.

On the day of the date of the last mentioned deed, Pierre Chouteau executed another deed assigning and transferring all benefit of the foregoing covenant of Louis V Bogy to Sophie Chouteau, widow, and seven children of Auguste P. Chouteau, deceased—and directing and appointing that Bogy should convey the land to said Sophie, widow, one moiety, and to the children the other, to be equally divided among them. This deed was acknowleged 18th September, and filed for record 23d October, 1846.

All the foregoing documents were given in evidence by the plaintiff, except the several deeds from Pierre Chouteau to Merriwether Lewis, Wm. C. Carr, Frederick Bates, Manuel Lisa, and George F. Strother, and the agreement between Stroter and Chouteau—the deeds from Strother to Mullanphy and O'Fallon, and Martin Thomas and Coon, the covenant of the plaintiff, and the assignment by Chouteau, which were produced and read by defendant.

An order of survey was made in the cause and executed by W. H. Cozens, his return with the plat was used at the trial and is by agreement to be used at the supreme court.

The plaintiff proved the possession of the defendant Shoab at the commencement of the suit, of a lot within the confirmation of Chouteau, and embraced by his deed to A. P. Chouteau under whom the plaintiff claims. The plaintiff also gave some evidence of the monthly and yearly value of that lot. Collins, the other defendant voluntarily appeared as Shoab's landlord and was made co-defendant.

Some evidence was given by defendant of surveys made by Rene Paul in Pierre Chouteau's presence, in 1826 and 1829, for the purpose of ascertaining the boundaries of the different parcels conveyed to Lewis, Carr, Bates and Lisa; that evidence refers to objects not located in any of the surveys in evidence, and is not material to the questions presented by this record. One witness stated that Chouteau in 1830, said that Carr's north line was a ravine, that he had shewn same line to Carr who knew that he was to go no further north. Chouteau said he had sold all north of that to Strother.

The same witness testified that the Marine Railroad Company were in possession in 1831, and continued in possession until 1841 or 1842, when they divided the land. Shoab's mill is on the railway tract, and was built by Page. when the land was surveyed by Brown in 1832. Carr's north line was north of the ravine pointed out by Mr. Chouteau. Witness claimed under Carr and compromised with the Marine railway, and got from the company 120 feet north of Carr's north line as shown by Chouteau. The surveys were made giving to all the other deeds their quantity, and Carr's tract was located farther north than the line claimed by the railway company.

It was proved by defendant that Marine railway was commenced in 1831, south of the mill occupied by defendant, which is on the railway tract.

On the part of the plaintiff it was proved that August P. Chouteau was absent in the Indian country from 1818 or 1820, and was in St. Louis two or three times and remained only a short time.

William H. Cozens, who executed the order of survey. stated that he is deputy county surveyor, that a survey which was produced in evidence by the defendant is in the hand writing of Rene Paul.

The plaintiff gave in evidence a survey, &c., taken from the records of the county surveyor' office which is to be used in the supreme court, and exhibits the location of the parcels conveyed to Lewis, Carr, Lisa and Bates according to the pretensions of various claimants, and also according to the true location in the opinion of the county surveyor.

The defendant prayed and the court gave the following instructions;

1. If the jury find from the evidence that the deeds given in evidence of P. Chouteau and wife to A. P. Chouteau, of A. P. Chouteau to P. Chouteau, and of P. Chouteau to George F. Strother, and also the agreement of Bogy, wife and P. Chouteau, were each duly executed and delivered at their respective dates, and that the land sued for in this action, is a portion of that described in and purporting to be conveyed in each of those deeds, and that at the time when said deed of P. Chouteau and wife to George F. Strother was made, he had no interest in the tract of land first described as conveyed in that deed, but had previously conveyed away all his interest therein, they are bound to find for the defendant, if they shall find from the evidence that the defendant holds under and by virtue of Strother's title.

2. That the tract of land first described in and purporting to be conveyed by said deed of Chouteau to George F. Strother, is bounded on the west by the common fields, and said deed does not purport to convey any land to the west of the east line of said common field lots.

3. The declaration of P. Chouteau in his deed to A. P. Chouteau, as follows: namely, the piece herein above sold, being the most northern part, and residue of the concession which was granted by Charles Dehault Delassus, is evidence against the plaintiff of the fact, that the said Pierre Chouteau had prior to that date sold and conveyed all the land in his said concession, except that embraced in the deed to A. P. Chouteau, and that said deed to A. P. Chouteau, conveyed said residue of said concession and said evidence is conclusive unless disproved.

4. If the defendant originally sued and in possession at the commencement of the suit, claimed under Strother or his grantees, it is sufficient within the instruction given. It is not necessary to show that all the defendants claim under the Strother title; and their rights as to this question must be determined as they were at the commencement of the suit.

The court also gave the following instructions:

5. If the jury find that the defendants or either of them entered upon the possession of the premises as tenant or subtenant by authority of those having the title from Strother, and claim title under him, such persons will be regarded as in parity with Strother.

To all which instructions the plaintiff excepted, and prayed the court to give the following:

1st. That the deed from Pierre Chouteau to Strother given in evidence, professes to convey all the land embraced in the original concession from the Lieut. Governor to Chouteau, which had not been sold by said Chouteau.

2d. That if the defendant in this action claims any benefit to himself from the fact that he holds under the title of the Marine railway company, then such fact is not to be shown in the absence of all documentary evidence, by the general testimony of any witness, that the defendant held under such title, and the jury will disregard such general testimony.

Which instructions the court refused to give, and the refusal was excepted.

The jury returned a verdict for the defendant and the plaintiff in due time made a motion for a new trial, and assigned as his reasons therefor:

That the verdict is against law, against evidence; that the court erred in giving instructions to the jury and refusing those prayed by the plaintiff. Which motion the court overruled and the plaintiff excepted.

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